

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** February 6, 2017

**TO:** Honorable Mayor and Councilmembers

**FROM:** City Attorney

**SUBJECT:** Appointment of Members to Otay Mesa Enhanced Infrastructure Financing District Public Financing Authority

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**INTRODUCTION**

On February 7, 2017, the San Diego City Council (Council) will be asked to adopt a resolution of intention to form the Otay Mesa Enhanced Infrastructure Financing District (EIFD)<sup>1</sup> pursuant to California Government Code sections 53398.50 through 53398.88 (EIFD Law) with the same boundaries as the Otay Mesa Community Plan Area. The intent of the proposed EIFD is to provide property tax increment financing for construction and installation of public facilities identified in the Otay Mesa Public Facilities Financing Plan.

The Council is required to establish the Otay Mesa EIFD Public Financing Authority (PFA) to govern the EIFD at the same time the Council adopts a resolution of intention to form the EIFD. Under the EIFD Law, the PFA governing board must be composed of three Councilmembers and two public members, all appointed by the Council. This Memorandum discusses the EIFD Law requirements for appointment of members to the PFA and the proposed process for appointment of members to the PFA.

**QUESTION PRESENTED**

What is the process for appointing members to the PFA?

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<sup>1</sup> For the sake of brevity, this Memorandum uses the acronym “EIFD” to refer alternatively to the Otay Mesa EIFD or to an enhanced infrastructure financing district in general, depending on the particular context.

## **SHORT ANSWER**

Although the EIFD Law specifies the membership composition of the PFA governing board, it does not specify an appointment process. As a result, the appointment process is a policy decision to be made by the Council.

## **BACKGROUND**

An EIFD exists to allow local agencies to allocate specified tax revenues to finance development of public infrastructure, affordable housing, and transit-oriented development projects, as well as certain other projects of communitywide significance. For more background, see City Att’y Report 2014-12 (Oct. 24, 2014) and City Att’y Report 2016-6 (Apr. 6, 2016).

## **ANALYSIS**

### **THE COUNCIL ESTABLISHES ELEMENTS OF THE APPOINTMENT PROCESS FOR PFA MEMBERS THAT ARE NOT SPECIFIED IN THE EIFD LAW.**

The EIFD Law requires that the PFA membership be comprised of three Councilmembers and two members of the public appointed by the Council. Cal. Gov’t Code § 53398.51.1(a)(1). The City must notice the vacancies of the public member seats before appointing public members. *Id.* Other than these requirements, the EIFD Law does not specify any other elements of the process for appointment of PFA members.

#### **A. Public Member Appointments.**

The EIFD Law specifies the Council as the appointing body for PFA members. As a result, the Council rather than the Mayor appoints the members of the PFA. *See* San Diego Charter § 265(b)(12) and 2013 City Att’y MOL 42 (2013-5; Apr. 12, 2013). The procedure for appointments made by the Council provided by Council Policy 000-13 section C would apply to the appointment of public members to the PFA, unless the Council specifies an alternative procedure by “Charter, ordinance, or other controlling authority.” Under this procedure, the Council President sends a memorandum to Councilmembers soliciting nominations for public members. Each Councilmember can submit one nomination for consideration. The Council President then docket the public member appointments for Council consideration. The Council is able to hear from the nominees to fill the vacancies one at a time when the Council considers making the appointments.

The Council can adopt a unique appointment process when creating the EIFD, so long as the changes are consistent with other legal requirements. Beyond the public member vacancy noticing requirements and requiring the appointments to be made by the Council, establishing the procedure for appointing public members to the PFA is a policy decision for the Council.

As discussed below, the proposed Council resolution establishing the PFA envisions that the Mayor will collaborate in the Council’s appointment process by recommending public members of the PFA for Council consideration. This aspect of the appointment process has been proposed

by the Office of the Mayor and is not a legal requirement for formation of the EIFD. The Mayor may be involved in recommending public member appointments to the PFA only where the Council, in its discretion, provides for the Mayor's participation. As long as the Council makes the final decision on the appointments, there is nothing in the EIFD Law prohibiting the Mayor from making recommendations regarding the public members of the PFA. The proposed process reserves the Council's discretion to reject the Mayor's recommendations, ensuring the Council makes the final decision on the appointments.<sup>2</sup> Public member appointments to the PFA are not subject to Mayoral veto because the EIFD Law specifies that the Council must make the appointments. 2013 City Att'y MOL 42 (2013-5; Apr. 12, 2013).

The proposed Council resolution establishing the PFA: (a) specifies qualifications for the two public members of the PFA (i.e., knowledge of real estate development and connection to the area of the EIFD); (b) provides that the two public members of the PFA will be appointed through a process in which the Mayor solicits nominations from Councilmembers and makes recommendations to the Council for approval; and (c) provides that the two public members of the PFA will serve for four-year terms.<sup>3</sup>

#### **B. Councilmember Appointments.**

Councilmember appointments to the PFA may be made when the Council adopts the resolution of intention to form the EIFD because there is no noticing requirement for Councilmember appointments. Alternatively, Councilmember appointments to the PFA may be made when the public members of the PFA are appointed. The proposed Council resolution establishing the PFA contemplates appointment of all members of the PFA at the same time through a separate Council action. This aspect of the appointment process has been proposed by the Office of the Mayor and is not a legal requirement for formation of the EIFD. Again, the Mayor may be involved in recommending Councilmember appointments to the PFA only where the Council, in its discretion, provides for the Mayor's participation. The Council makes the ultimate decision on Councilmember appointments to the PFA, which are also not subject to Mayoral veto.

For appointments of Councilmembers to outside agencies, the Mayor and the Council President generally transmit a joint memorandum in December recommending Councilmembers' assignments, which the Council approves by resolution. Given that the EIFD Law requires the Council to make Councilmember appointments to the PFA, the appointment of Councilmembers to the PFA must be done outside of the City's annual appointment resolution, which may be vetoed by the Mayor. The appointment process described in Council Policy 000-13 does not lend itself to appointment of Councilmembers to the PFA, but would be the default procedure, if no other appointment process is provided by the Council. As discussed above regarding

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<sup>2</sup> A collaborative process in appointing board members, even where the applicable law provides for a unilateral appointment process, has been used by the City in at least one recent situation. The redevelopment dissolution laws state that the Mayor may unilaterally appoint the City's two representatives on the seven-member Oversight Board. Cal. Health & Safety Code § 34179(a)(2), (7). However, all appointments of City representatives to the Oversight Board thus far have been accomplished through a collaborative process between the Mayor and the Council, similar to the process proposed for the PFA.

<sup>3</sup> One of the initial public member seats serves for only two years in order to stagger the public member terms.

appointment of public members to the PFA, establishing the process for appointment of Councilmembers to the PFA, other than the EIFD Law requirement that the Council make the appointments, is a policy decision for the Council.

The proposed Council resolution establishing the PFA provides that: (a) the three Councilmember positions with the PFA will be appointed through a process in which the Mayor recommends Councilmembers for approval by the Council, whom the Council may appoint or reject; and (b) the three Councilmembers appointed to the PFA will serve for one-year terms.<sup>4</sup>

### CONCLUSION

Under the EIFD Law, the PFA governing board must be composed of three Councilmembers and two public members. The Council appoints the members of the PFA. Other than requiring notice of vacancies for the public members and requiring the appointments to be made by the Council, the EIFD Law does not specify any other element of the process for appointing members of the PFA. As a result, establishing the other aspects of the appointment process for PFA members is a policy decision for the Council.

MARA W. ELLIOTT, City Attorney

By /s/ Delmar G. Williams

Delmar G. Williams  
Deputy City Attorney

By /s/ Jennifer L. Berry

Jennifer Berry  
Deputy City Attorney

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cc: Scott Chadwick, Chief Operating Officer

David Graham, Deputy Chief Operating Officer, Neighborhood Services

Mary Lewis, Chief Financial Officer

Lakshmi Kommi, Director, Debt Management

Andrea Tevlin, Independent Budget Analyst

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<sup>4</sup> The initial Councilmembers appointed to the PFA shall only serve until December 9, 2017, to generally align the Councilmember terms on the PFA with the date of the swearing-in of new Councilmembers following an election and minimize any gap in appointment of new Councilmembers to the PFA, if necessary.